FILE COPY

Office Supreme Court, U.S.
FILED
MAY 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 966

G. & K. INVESTMENT COMPANY, *Petitioner,*

v.

GEORGE M. HARRISON; NEWTON BRYANT; MONROE BRYANT; PARALEE BRYANT HARTWELL; ROSA BRYANT; JAMES W. BRYANT, Guardian of the Estate of ROSA BRYANT, N.C.M.; KERMIT W. BRYANT; COLUMBUS M. BRYANT; LILLIE MAE BRYANT; JAMES W. BRYANT; LILLIAN A. CARTER; JERRY LEE BRYANT; CHARLES B. BRYANT; GEORGE W. BRYANT, JR.; CHESTER K. BURNHAM; JOE R. SCROGGINS; L. L. ROBERTS; FLOYD A. WILLIAMS, JR.; HALE E. ROBERTS; NELSON CASE; D. A. BIGLANE; CHESTER BURNHAM CHEVROLET CO., INC., a Corporation; W. R. FAIRCHILD CONSTRUCTION CO. LTD.; R. PEARCE PHILLIPS; MICHAEL L. CARR, JR.; W. K. BOWEN; JOSEPH WILLIAM KNOX; and J. C. HUTTO, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

ELIZABETH WATKINS HULEN
Jackson, Mississippi

Of Counsel:

WILLIAM HAMILTON WATKINS, JR.
P. O. Box 60
Tylertown, Mississippi

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Amendment and Statute Involved	2
How Federal Question Is Presented	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	10
Appendix	
Opinion of Supreme Court of Mississippi	1a
Judgment of the Supreme Court of Mississippi	12a
Decree of Chancery Court	12a

CITATIONS

CASES:

Ebert v. Poston, 266 U.S. 548	9
Gift v. Love, 164 Miss. 442	8
Harvey v. Johnson, 111 Miss. 566	8
Lake v. Perry, 95 Miss. 550	7
Terrace v. Thompson, 263 U.S. 215	8
United States v. Cooper Corp., 312 U.S. 600	8
White v. United States, 191 U.S. 545	8

STATUTES:

Amendment XIV, U. S. Constitution	2, 7
28 U.S.C., Section 1257 (3)	2
Section 470, Mississippi Code of 1942	2, 4, 6, 7, 8, 9
Section 479, Mississippi Code of 1942	6, 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

G. & K. INVESTMENT COMPANY, *Petitioner*,

v.

GEORGE M. HARRISON; NEWTON BRYANT; MONROE BRYANT; PARALEE BRYANT HARTWELL; ROSA BRYANT; JAMES W. BRYANT, Guardian of the Estate of ROSA BRYANT, N.C.M.; KERMIT W. BRYANT; COLUMBUS M. BRYANT; LILLIE MAE BRYANT; JAMES W. BRYANT; LILLIAN A. CARTER; JERRY LEE BRYANT; CHARLES B. BRYANT; GEORGE W. BRYANT, JR.; CHESTER K. BURNHAM; JOE R. SCROGGINS; L. L. ROBERTS; FLOYD A. WILLIAMS, JR.; HALE E. ROBERTS; NELSON CASE; D. A. BIGLANE; CHESTER BURNHAM CHEVROLET CO., INC., a Corporation; W. R. FAIRCHILD CONSTRUCTION CO. LTD.; R. PEARCE PHILLIPS; MICHAEL L. CARR, JR.; W. K. BOWEN; JOSEPH WILLIAM KNOX; and J. C. HUTTO, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, entered in the above-entitled case on December 7, 1959.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, printed in the Appendix, infra, p. 1a, is reported in 115 So. 2d 918, and not yet officially reported in Mississippi Reports.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on December 7, 1959. Appendix, infra, p. 12a. Rehearing was denied on January 18, 1960. (R. 241). By orders dated April 14, 1960, and May 16, 1960, this Court extended the time within which to file this petition for writ of certiorari to May 14, 1960, and May 28, 1960, respectively. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since petitioner has been deprived of property without due process of law as required by the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether the Supreme Court of the State of Mississippi can divest petitioner, an assignee, of property lawfully vested in the original assignor by the Mississippi statute of descent and distribution, by creating a judicial exception to the statute, without violating the due process of law guaranteed to petitioner by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

United States Constitution, Fourteenth Amendment (pertinent part):

"Section 1. . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Mississippi Code 1942 Annotated:

"§ 470 Descent of property as between husband and wife.

If a husband die intestate, and do not leave children or descendants of children, his widow shall be entitled to his entire estate, real and personal, in fee simple, after payment of his debts; but where the deceased husband shall leave a child or children, by that or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate, in either case in fee simple. If a married woman die, owning any real or personal estate not disposed of, it shall descend to her husband, and her children or their descendants if she have any surviving her, either by a former husband or by the surviving husband, in equal parts, according to the rules of descent. And if she have children, and there also be descendants of other children who have died before the mother, the descendants shall inherit the share to which the parent would have been entitled if living as coheirs with the surviving children. But if she have no children or descendants of them, then the husband shall inherit all of her property." (Formerly § 1404, Mississippi Code of 1930)

HOW FEDERAL QUESTION IS PRESENTED

The federal question presented by this petition was raised by petitioner in the trial court in its Answer of Cross-Defendant to Cross-Bill, and also in its Further Answer of Cross-Defendant to the Cross-Bill, both pleadings appearing in the Appendix of the record as Exhibits "A" and "B", respectively, to Motion of Appellee to Perfect Record. (R. 252) The question tion was also presented to the Supreme Court of the State of Mississippi in Reply Brief on Behalf of the Appellee, G. & K. Investment Company. It was argued to the Supreme Court of Mississippi on page 37 of that brief:

> "We call the Court's attention to the final proposition, that in view of the existence of the affirmative statute covering the right of inheritance of Joseph William Knox, *Section 470, Mississippi Code of 1942,* to deprive him of that right would be violative of the Constitution of the United States, and of the Constitution of the State of Mississippi, in that he would be deprived of his property without due process of law."

And again on page 38 of the same brief:

> "To deprive him of that right would be violative of the Constitution of the United States and the Constitution of the State of Mississippi, in that he would be deprived of his property without due process of law."

STATEMENT

A. Summary of Litigation

Petitioner, a Mississippi corporation, filed a bill of complaint in the Chancery Court of Pike County, Mississippi, against respondents, asking that the oil, gas, and mineral leases on the entire interest claimed by respondents in 160 acres of land in an oil field be set aside, insofar as the leases cast a doubt, cloud, or suspicion on the fractional leasehold estate in the 160 acres owned by petitioner, and for other relief. (R. 1-16). The Chancery Court held an interlocutory hearing and on January 24, 1959, ordered the appointment of a Receiver. (R. 144-146). The Chancery Court did not entertain the case on the merits. (R. 144-146).

The respondents appealed to the Supreme Court of Mississippi from the interlocutory decree of the Chancery Court. Respondents alleged that the Chancery Court of Pike County erred in appointing the receiver because the evidence failed to establish the legal requisites for a receivership. The evidence affirma-

tively showed the absence of circumstances justifying the appointment of a receiver, and the evidence "shows conclusively that Joseph William Knox, through whom the appellee claims, owns no interest in the properties in litigation." (R. 226).

The Supreme Court of Mississippi found that the petitioner had no interest in the oil lands in question, hence had no "right to obtain a receivership for the property involved." That court based its decision on its determination that Joseph William Knox, the original assignor of the leasehold, was estopped to inherit any part of the estate of Alpha Knox, his wife, under the Mississippi statute of descent and distribution because he had entered into a bigamous ceremonial marriage subsequent to his marriage to Alpha.

B. Summary of Facts

Joseph William Knox married Alpha Bryant in August, 1923. (R. 204) They lived together as man and wife until August, 1928, when Alpha was committed to a state insane asylum. (R. 220) In March, 1929, Joseph married Lucile Brown without having obtained a divorce. (R. 205) In 1930 Joseph heard that the Grand Jury in Forrest County was considering bringing a bigamy indictment against him, although it had been his mistaken belief that Alpha's commitment terminated their marriage. (R. 220). He consulted a lawyer who drew up a divorce petition for him. He went to the asylum and took Alpha out to a notary where she executed and acknowledged a waiver of process and appearance. (R. 211). On March 31, 1930, the Chancery Court of Forrest County, Mississippi, decreed a divorce on the ground that Alpha had been insane at the time of marriage. (R. 170). A certificate of the superintendent of the asylum to the effect that

Alpha was insane was not filed in the court until April 1, 1930. (R. 168). That this divorce was void is conceded by all parties. After the decree, Joseph again married Lucile Brown and lived with her until her death. Alpha died intestate in the asylum on August 12, 1934. (R. 207).

At the time of her marriage to Joseph, and at the time of her death, Alpha owned a one-seventh interest in a 60-acre tract, and a one-eighth interest in a 100-acre tract, both tracts together comprising the 160 acres involved in this suit. (R. 91). She had inherited these interests from her parents. (R. 89-91, 228-229).

On May 12, 1958, Joseph William Knox executed an oil, gas, and mineral lease (R. 17) in the property inherited from Alpha to one Louis H. Magee, who, thereafter, assigned that lease to petitioner. (R. 18).

C. Facts and Law Involved in the Denial of Due Process

When Alpha Bryant Knox died intestate on August 12, 1934, her estate including the property involved in respondent's lease, passed to her husband, Joseph, under Section 470* of the Chapter of Descent and Distribution of the Code of the State of Mississippi. The only statutory exception to this applies to persons who unlawfully kill the intestate from whom they would inherit. (Section 479*). Therefore, Knox became vested with the ownership of his deceased wife's property and the decision of the State Supreme Court is judicial legislation that purports in 1959 to divest petitioner, Knox's successor in interest, of property irre-

* Sections 1404 and 1413 of the Code of 1930 were applicable in 1934. Both were reenacted in the Code of 1942 without change and the current designation is used in this Petition.

vocably vested in Knox in 1934 under the statutes of the State of Mississippi.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Mississippi has, by judicially establishing an exception to the Mississippi statute that the legislature did not see fit to enact, usurped the legislative function and in so doing has taken petitioner's property against the Constitutional Prohibitions contained in the Fourteenth Amendment and given it to respondents, thus resulting in the denial of due process. How, within the ambit of the Fourteenth Amendment of the Constitution of the United States, is it possible that property inherited by a man from his wife in 1934 in accordance with the statute of descent and distribution of a state can be taken from his ultimate assignee by a court of that state 25 years later?

Section 470 of the Mississippi Code provides that a husband is entitled to inherit from his wife. Only one exception was enacted by the Mississippi legislature. Section 479 provides that if any person wilfully causes or procures the death of another, he shall not inherit from that person. No other exception to Section 470 can be found in the statutes of the State of Mississippi.

It is true that Joseph William Knox attempted to divorce his wife Lucile, but that divorce was void and had no effect upon their relationship. Under Mississippi law, "[a] void judgment is without legal effect and from it no rights can be obtained and it neither binds nor bars anyone." *Lake* v. *Perry*, 95 Miss. 550, 49 So. 569. When Lucile died in 1934, Joseph was still her husband, and by virtue of that fact under Mississippi law, he succeeded to her estate.

It is firmly established under Mississippi law that the legal title to lands under the statute of descent descends to the heirs at the time of the intestate's death. See *Harvey* v. *Johnson*, 111 Miss. 566, 71 So. 824, and *Gift* v. *Love* 164 Miss. 442, 144 So. 562, 86 A.L.R. 63, 71. This is in accord with the rule generally prevailing in the United States. See *Randall* v. *Krieger*, 90 U.S. 137.

Such a title is a vested right and includes the right to execute a lease of the oil, gas, and mineral rights in the land. Property rights in land include the right to use, lease, and dispose of it for lawful purposes, and those rights are protected by the Constitution. *Terrace* v. *Thompson*, 263 U.S. 215.

The only law applicable to Knox and the lands owned by his wife was Section 470 of the Mississippi Code, the Chapter of Descent and Distribution. Absent an applicable statutory exception, title to his wife's estate vested in Knox when she died. The Supreme Court of Mississippi cannot create an exception not specifically provided and enacted by the Mississsippi legislature. When it did so, it exceeded the bounds of the judicial function and deprived Knox of his lands and petitioner of its lease without due process of law.

The action of the court below was exactly that proscribed by this court in *United States* v. *Cooper Corp.*, 312 U.S. 600, at 605, when it said, "But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." In an earlier case, *White* v. *United States*, 191 U.S. 545, this Court used the following language at page 551:

> "It is equally true that it is the business of the courts to decide what the law is, and not by consideration or surmises as to the policy of the government, have the effect to adjudge that to be law which has not been so enacted by the legislature. Dewey v. United States, 178 U.S. 521."

It is the contention of the petitioner that Section 470 and Section 479 of the Mississippi Code are the only laws applicable to the descent of intestate land in the state. Section 479, of course, was not applicable in this case, leaving only Section 470, which states: "But if she have no children or descendants of them, then the husband shall inherit all of her property." There is no proviso in Section 470, or indeed, anywhere in the statutes of Mississippi, that could have prevented the operation of Section 470 in passing Alpha Knox's estate to her surviving spouse, Joseph Knox. The Mississippi Supreme Court violated the principle laid down by Justice Brandeis in *Ebert* v. *Poston*, 266 U.S. 548, at 554:

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissis* does not justify judicial legislation."

To permit the decision of the Supreme Court of Mississippi to stand would give a court license to interpose its own rules on the devolution of property in derogation of the law enacted for that purpose in each of the several states.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIZABETH WATKINS HULEN
Jackson, Mississippi

Of Counsel:

WILLIAM HAMILTON WATKINS, JR.
P. O. Box 60
Tylertown, Mississippi